U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

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Honorable Robert McClory
Ranking Minority Member
Subcommittee on Monopolies
and Commercial Law
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Congressman McClory:

This is in response to your request of June 9, 1982, for a further elaboration of the views of the Antitrust Division on resale price maintenance. The problems posed by the practice of resale price maintenance are exceedingly complex ones. While this may involve repetition of some of the points I have previously made in testimony before the Subcommittee, I fear that I must burden you with a rather lengthy response in order to do justice to those complexities.

The phenomenon of resale price maintenance ("RPM") must be considered both from an economic standpoint and from a legal one. I turn, first, to the economic considerations. It is the view of the Division that the central purpose to be served by the antitrust laws is the preservation of free markets, markets characterized by intense competition, to the end that our national resources may be deployed efficiently so as to yield the largest possible quantity and the richest possible variety of goods and services to our population. In general, this end is best attained by minimizing government interference with business behavior. Business units should be permitted to conduct their affairs in accordance with their own perceptions of their own best interests in rivalry with other businesses in the same industries. Businesses should be permitted, with as few exceptions as possible, to enter and to enforce contracts on terms that are mutually satisfactory to the parties to those contracts.

The antitrust laws do, of course, represent a kind of government interference into that process of free market rivalry and constitute a limited exception to the principle of freedom of contract. But those laws should be interpreted so that they constitute a limited intrusion: private agreements should be struck down and punished only where there is a sound economic basis for supposing that the private agreements will hinder rather than advance the central objective of efficient resource allocation.

It is well established as a matter of economics--indeed it is virtually a matter of unanimous agreement--that certain types of horizontal agreements have those unwanted effects. Agreements between competitors setting minimum prices for the products they sell, agreements between competitors not to compete with one another in specific markets and other analogous agreements which lessen the intensity of competition between rivals are and should remain the central target of the Division's antitrust policy.

In contrast to agreements of those types, agreements between parties who perform sequential steps in the process of producing and distributing goods and services, agreements that are usually characterized as "vertical" rather than "horizontal," are typically conducive to competition and economic efficiency. The negotiation, execution and enforcement of contracts is an indispensable part of the process of competition. Such contracts, for example a contract between a manufacturer and a distributor, obviously circumscribe the freedom of the parties to the contract to do as they wish from moment to moment. Indeed, the very purpose of contracts is to circumscribe the freedom of the parties to them in accordance with the terms of their own agreements. They cannot be regarded as anticompetitive because they perform their intended function. The policy of the Antitrust Division is to interfere with such vertical contractual arrangements only where there is some persuasive basis for supposing that contracts of particular types reduce output, retard innovation, or otherwise interfere with economic efficiency. It is common ground among substantially all economists that vertical agreements, with only rare exceptions, do not have such consequences. The question then is whether resale price maintenance constitutes an exception to that general proposition and, if so, under what circumstances.

To facilitate our discussion, I will assume that only agreements between manufacturers and distributors are at issue, although what I say, in fact, applies to any two sequential participants in a production-distribution chain.

I start with the obvious proposition that if, in a given industry, there were dozens of manufacturers of a particular product and scores of potential distributors of that product, the freedom of any one manufacturer to enter into a resale price maintenance agreement with his subset of distributors could not possibly be harmful or anticompetitive in any way. If Manufacturer A and Distributor A entered into such an arrangement, and if its only consequence was to maintain an artificially high price for the product of Manufacturer A, then that product would soon be driven from the market by the rivalry of lower price products of other manufacturers distributed by other distributors, and perhaps by Distributor A as well.

In the context of a competitive market then, if resale price maintenance does no more than achieve artificially high prices at the distribution level, it would never be in the interest of either the manufacturer or the distributor to employ the practice. Their endeavor to do so would be a commercial mistake, only one of the many commercial mistakes that firms in a free market are free to make; and they would suffer the penalties imposed on mistakes by the process of competition. No government interference would be necessary to bring about the disappearance of the practice.

If mere elevation of resale price were the purpose of RPM, a manufacturer could achieve that result by raising his own price to the distributor and capture revenues commensurate with that higher price. Under resale price maintenance, he does not do that: he insists on a high retail price but permits the retailer to keep the revenues that derive from that higher price; and at the same time he accepts the consequence that a smaller quantity of his product will be sold because it is to be sold at a higher price. One cannot suppose that manufacturers, to their own detriment in terms of their sales volume, insist on conduct that can only fatten their distributors' profit margins and lessen their own. Plainly, manufacturers who wish to employ resale price maintenance, and who seek out distributors who are willing to enter contracts in which they promise to comply, have some other end in view.

It should be obvious that when Manufacturer A employs RPM he is attempting to create, on the part of those distributors who agree to comply, an incentive to handle his product at the distributor's level differently from the way in which it would be handled in the absence of such an agreement--in some way which the manufacturer expects will redound to his advantage in his rivalry with other manufacturers. By setting the distributor's price for each unit above his usual costs of distribution, the manufacturer may hope to induce the distributor to incur additional costs: to engage in more intensive local advertising, or to incur the expense of employing more knowledgeable and more highly trained sales personnel who will increase sales volume of the product by explaining more accurately to customers how the product should be used for best results, or to increase consumer satisfaction with the product by providing quicker and more expert post-sale repair and service facilities.

Of course, RPM will not always be effective to induce the distributor to behave in one or another of those ways. Sometimes it will be, and the manufacturer will have achieved his objective. Other times it will fail and it will serve only to elevate retail price; but in these latter cases, the manufacturer's mistake will be punished in the marketplace. Government interference is not needed. The freedom to try something different, to make mistakes and to suffer the failure in the market, is one of the most important aspects of a free market system.

Of course, no particular distributor is required to go along with the manufacturer who wishes to use RPM. A distributor may perceive at the outset, or if not at the outset then still sooner than the manufacturer, that the objective will not be achieved. The distributor is appropriately free to refuse to deal with such a manufacturer. A manufacturer cannot <u>demand</u> that a distributor handle his product in any particular way: he can employ RPM only if there are distributors who are willing to agree to such an arrangement. Conversely, a distributor should not be free, and in our view is not free, to <u>demand</u> that a manufacturer sell his product to the distributor and permit the distributor to resell that product in any way that suits the whim of the distributor from moment to moment. Distribution of a manufacturer's product by a distributor is a consensual matter, a cooperative undertaking, that should proceed on terms concurred in by each of them.

It is our judgment that manufacturers of certain types of products often have legitimate reasons for wishing to control the distribution environment in which those products are resold. If, for example, a product is technologically complex, its success in the marketplace may well depend upon the availability, at the point of sale, of technically trained sales personnel who are able both to instruct the consumer and to assist him in selecting the model, or the combination of components, that will best suit his individual needs.

There is a variety of business procedures through which a manufacturer might exercise that control. He might open his own distribution outlets, staffed with his own employees, whom he would expect to behave as he instructed; but direct distribution is not feasible for most manufacturers. Alternatively, the manufacturer might enter into long and detailed contracts with his distributors, contracts describing exactly how the sales personnel are to be trained and what they are to say to customers; but day-to-day enforcement of such contracts with a large number of distributors would be prohibitively expensive. Or alternatively, the manufacturer might simply attempt to persuade his distributors that such a selling approach promised the best chance of success and profit, both to his distributors and himself, and to encourage them to behave in that way without a contractual commitment on their part.

But a manufacturer with any sense who takes this last course will be aware that the selling practice he desires is more expensive than alternative selling practices, and he will know that the retail price will have to be high enough to cover the costs a distributor incurs in following that practice. A problem will arise if some of his distributors adhere to the expensive distribution mode and others save costs by refusing to do so. The uncooperative, since they will have lower costs, will be able to profit by reducing the retail price below the costs of the cooperative.

But if some distributors are incurring costs by following the agreed sales procedure and are selling at a higher price which cover those costs, while other distributors are not doing so and sell at lower retail prices, then the free rider phenomenon will appear. A substantial number of customers will go to the higher price outlet, will consume the time of sales personnel there to obtain the appropriate counseling, but will then leave without buying and purchase from a low cost outlet instead. It will prove to be impossible for some retailers to afford expensive point of sale services for which it is not practicable to impose a separate charge if other distributors are not doing so and are selling at prices which reflect the cost savings of not doing so. If the manufacturer is to be successful in controlling the manner in which his product is sold and the quality of point of sale services afforded in conjunction with sale of his product, he must be able to shelter the gross margins of those distributors who are complying with his wishes from the pricing pressure of distributors who are not.

I emphasize that in speaking of a manufacturer protecting his distributors' margins, I am not suggesting that he will enable those distributors to earn more than competitive profits. Protection of their margins is necessary and is afforded because their costs are higher as a consequence of their compliance with their undertaking to market the product as agreed. But it would be inconsistent with the profit-seeking objective of the manufacturer to let his distributors earn profits above the competitive level. Accordingly, he has every incentive to authorize a sufficient number of distributors who will sell the product as agreed so that rivalry between them will eliminate any but competitive profits.

It is true, of course, that RPM is not the only vehicle available to a manufacturer to shelter his distributors' margins to the degree necessary to facilitate provision of point of sale services. He may engage in direct distribution by his own employees, as I previously mentioned. He may create geographic breathing room for his distributors by authorizing each to sell only from a designated location and maintaining adequate spatial separation of those locations, the practice that was upheld in <u>GTE-Sylvania</u>. <u>1/</u> He may create exclusive territorial distributorships, a practice that is economically indistinguishable from the practice involved in <u>GTE-Sylvania</u>, or he may use resale price maintenance. One technique will be more successful in some circumstances, another more successful in another; but all the techniques have essentially the same economic consequences. Correct selection of the most cost effective technique will be in the interest of the manufacturer, his distributors and the ultimate consumer. The ability of the manufacturer and the distributor, by consensual agreement, to select the vehicle they expect to work best, including the right to make mistakes in that regard, which they will no doubt on occasions do, is also embraced by the concept of free markets and miminial government interference.

<u>1/</u> Continental T.V., Inc. v. GTE-Sylvania Inc., 433 U.S. 36 (1977).

I do not mean to suggest by what I have said that the various business techniques for controlling distribution are all precise economic equivalents. They are not. The use of territorial restrictions of the several kinds I have mentioned is capable of having anticompetitive effects by facilitating horizontal collusion only under extremely rare circumstances. I will not elaborate on what those circumstances are, since they are not germane to the question you raised or to my answer. RPM can have anticompetitive consequences in a substantially more common set of circumstances. If it were difficult to distinguish those circumstances in which RPM may be harmful from those in which it cannot, one might justify a sweeping prophylactic rule banning it in all circumstances. In fact, however, the circumstances in which RPM may be harmful are relatively easy to identify. Hence, although there is economic justification for antitrust intervention when these circumstances are present, it cannot plausibly be argued that the practice should be attacked whenever it appears.

RPM can have adverse economic effects, at which the antitrust laws might properly be aimed, in two different sets of circumstances. One, which does occur with some frequency, would be presented by a situation in which the market at the manufacturing level was highly concentrated and all or substantially all of the manufacturers employed RPM. Under these circumstances, the set of manufacturers might be employing RPM as a device to facilitate and to police horizontal price fixing among themselves. No one such manufacturer could obtain an advantage by cheating on the cartel arrangement by reducing his price to retailers because his retailers would be unable to sell more of his product unless, in addition to changing his own price to them, he authorized them to change their retail prices. However, to change their authorized resale price would be a highly visible act that would be immediately detected by the other members of the cartel. Accordingly, persuasive economic grounds would exist for challenging RPM in that context.

RPM might also have adverse economic consequences in a second type of situation which is probably more theoretical than real; certainly it would rarely be encountered in the United States. If the number of potential distributors was very few and if, in addition, there were substantial difficulties which prevented manufacturers from creating additional distribution outlets, then distributors might employ

RPM as a facilitating device for collusion at the distribution level. It would be necessary for the distributors to persuade all, or substantially all, the manufacturers to adopt RPM and to establish price levels in accordance with the distributors' wishes. As I previously suggested, this course would be contrary to the interests of the manufacturers, and they could be expected to resist. Nevertheless, it is conceivable, though most unlikely, that one might encounter a situation of that type. Here, too, an economic basis for antitrust attack would exist. But where neither of these two sets of circumstances exist, no persuasive reason for bringing the antitrust laws to bear on RPM can be identified.

It is true, of course, that RPM eliminates a kind of activity that might naively be described as competition: underselling by free riders will, of course, drive down prices in the short run, but it is economically erroneous to regard all behavior that achieves short run price reductions as being competitive. From that standpoint, the activity of a patent infringer, or a pirate of copyrighted phonograph records, or indeed, sales of stolen goods in a flea market, will achieve short run price reductions. But if one takes a slightly longer point of view, it should be obvious that investments in innovation, or in the recording of phonograph records, or types of property vulnerable to theft, will be significantly reduced if the values which are created by the investment are subject to misappropriation in these ways.

Real competition results in an increase in the quantity of product which reaches the hands of consumers. The parasitic forms of competition discussed above result in a reduction in the quantity of product which reaches consumers. The same must be said of free riders who drive from the marketplace retail services that are well suited to the successful marketing of a complex product: the economic incentives for manufacturers to develop and market such products will be reduced and the quantity of such products that reaches ultimate consumers will be lessened rather than increased. These economic considerations, in combination with the peculiar and somewhat confused legal status of RPM to which I will next turn, underlie the position of this Administration with respect to RPM: namely, that it should be judged under a rule of reason approach that would result in its invalidation whenever it appeared in contexts such that the practice might be conducive to horizontal collaboration but would allow the practice in contexts where it could not plausibly be serving to facilitate collusive behavior.

So far as the legal status of RPM is concerned, it is undeniable that the Supreme Court of the United States has, in a wide variety of contexts over three quarters of a century, struck the practice down. Hence, it is not the position of the Antitrust Division that RPM "is" not illegal per se; it is our position that RPM "should" not be illegal per se in view of the competitive principles outlined above.

The Supreme Court first invalidated RPM in the Dr. Miles 2/ case in 1911. Justice Hughes began with the historical proposition that "a general restraint upon alienation (of chattels) is ordinarily invalid" at common law, a proposition recognized to have little relevance to antitrust analysis in more recent cases. 3/ But Justice Hughes then went on to a more pragmatic analysis: he noted that Dr. Miles had advanced by way of justification only that "confusion and damage have resulted from sales at less than the prices filed." He rejected this defense, saying,

> [T]he advantage of established retail prices primarily concerns the dealers. . . . If there be an advantage to a manufacturer . . ., the question remains whether it is one which he is entitled to secure by agreements. . . . As to this, the complainant can fare no better . . . than could the dealers themselves if they formed a combination . . . to achieve the same result. . . .
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> But agreements . . . between dealers . . . are injurious to the public interest and void. 220 U.S. at 407-08.

Thus, on the first, and one of the few, occasions on which the Supreme Court has attempted to explain why RPM is harmful, it offered an explanation in economic terms that is wrong in the light of sound economic analysis. A price fixing combination at the retail level would generally be

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2/ Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

3/ Compare GTE-Sylvania with United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

damaging to a manufacturer's objective, and its economic consequences would bear no similarity at all to the consequences of RPM in contexts where a manufacturer would choose to negotiate with his retailers to impose it.

Even in the original case, Justice Holmes, in dissent, demonstrated characteristic insight: "I cannot believe that in the long run the public will profit by . . . permitting (retailers) to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which . . . the public should be able to get." 220 U.S. at 412.

The use of the phrase "per se" did not develop until much later, but the court continued to treat RPM as invalid without any examination of the commercial context in which it appeared or any further examination of the economic question why it should be regarded as harmful.

The legal context became far more complicated with the Supreme Court's decision in United States v. Colgate & Co. 4/ which, although it did not permit agreements fixing retail prices, was long interpreted to authorize the manufacturer to recommend prices and cut off retailers who did not comply. Tending in the same permissive direction, the Supreme Court, in the 1926 General Electric 5/ decision, upheld the right of a manufacturer to designate retailers as his "agents," to deliver goods to them on "consignment" and to effectuate RPM in that way. These two decisions opened paths for manufacturers to achieve their legitimate purposes and thus reduced the level of conflict about RPM to some extent. Indeed, from our standpoint, the decisions were too permissive in that paths were opened in contexts where RPM might serve to facilitate horizontal collusion as well as in contexts where it could not.

The next development, too, was a permissive one: Congress enacted the Miller-Tydings Amendment and, subsequently, the McGuire Act. Thus, RPM was legalized, again in potentially harmful contexts as well in manifestly harmless ones, wherever a manufacturer was willing and able to follow the tortuous procedural requirements state law developed

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4/ 250 U.S. 300 (1919).

5/ United States v. General Electric Co., 272 U.S. 476 (1926).

pursuant to the federal Fair Trade laws and wherever he could fit his situation within the consignment device sheltered by General Electric. Controversy during this period was limited to situations in which neither of these shelters were availed of and in which the complaining party asserted that a pattern of "refusal to deal" conduct, attempted in an effort to work within the shelter of the Colgate doctrine, had nevertheless resulted in the formation of implied contracts to engage in resale price maintenance. The Supreme Court's decision in Parke Davis 6/ is the preeminent example. The decisions during this period devoted much attention to the endless legal refinements that surrounded Colgate, the General Electric doctrine and the Fair Trade laws, but none addressed the still unanswered question why RPM, in all its manifestations, should be regarded as unlawful.

The closest the Supreme Court came to offering any explanation responsive to this fundamental underlying question came in Keifer-Stewart, 7/ a case which involved maximum prices rather than minimum prices. There the Supreme Court said, "[S]uch agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." 340 U.S. at 213.

This explanation, of course, does not suffice, for it suggests the invalidity of every commercial contract since each restrains the ability of contracting parties to violate the terms of the contract. More clearly still, it does not even allude to the economic considerations on which antitrust law should be based.

In the mid-60's, the Supreme Court began to narrow the restrictions on the practical range of freedom of manufacturers, still without adequate consideration of economic consequences. In Simpson v. Union Oil Co., 8/ the Court struck down a "consignment" arrangement that was identical in every detail to the arrangement upheld in General Electric,

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6/ United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

7/ Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

8/ 377 U.S. 13 (1964).

while steadfastly denying that it was departing from the holding in General Electric. When, if ever, consignment arrangements may be used by parties in the distribution chain remains to this day shrouded in confusion. The explanation which the Court did give in Simpson is inconsistent with the explanation the Court had offered in the leading precedent of Dr. Miles. In Simpson, the Court suggested that RPM was a device used by manufacturers to coerce and to injure retailers. It said, "We disagree . . . that there is no actionable wrong or damage [to the retailer] . . . . [T]he 'consignment' agreement . . . [is] being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment." 377 U.S. at 16. Thus a device, first condemned because it was thought to be none of a manufacturer's business and indistinguishable from a cartel among retailers, was characterized in Simpson as a manufacturer's device for exploiting retailers. The one description is as much without factual foundation as is the other. Thus, it remains true today that courts have failed to devote sufficient attention to the economic impacts, in different contexts, of RPM.

In our judgment, the Court's careful and thoughtful analysis in GTE-Sylvania indicates a willingness to look beyond the verbal similarities between RPM and horizontal price fixing. The treatment is curiously inconsistent with the attitude the Supreme Court has taken toward other vertical arrangements. In White Motor, 9/ for example, the Court refused to classify vertical territorial arrangements as per se illegal, saying, very wisely, "[W]e do not know enough of the economic and business stuff out of which these arrangements emerge" to justify such a classification. Accordingly, the Court held that summary judgment had been improperly granted.

Similarly, in GTE-Sylvania, a case involving location clauses, the Supreme Court overruled the per se rule it had previously laid down in Schwinn 10/ stating, [t]he rule of reason is "the prevailing standard of analysis." 433 U.S. at 49. The Court examined in detail the economic consequences of a distribution practice that is closely analogous

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9/ White Motor Co. v. United States, 372 U.S. 253 (1963).

10/ United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

to RPM, and whose economic consequences are also closely analogous to RPM, and held that the legalities of the practices must be judged under the rule of reason. "[D]eparture from the rule-of-reason standard," the Court said, "must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." 433 U.S. at 58-59.

If that declaration is taken to mean what it says, then RPM also should be judged under a rule of reason. Nevertheless, the Court did say in a footnote, inconsistently with that declaration, "[W]e are concerned here only with nonprice vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy . . . Furthermore, Congress recently has expressed its approval of a per se analysis . . . by repealing . . . the Miller-Tydings and McGuire Acts." 11/

There is, however, no necessary incongruity between the action of Congress in repealing the Fair Trade laws and a rule of reason treatment of that practice under the Sherman Act. The Fair Trade laws were far too sweeping a determination of per se legality, and we agree that they ought to have been repealed. In our judgment, the action of Congress in 1976 does not preclude the Supreme Court from reaching a conclusion that, although RPM continues to be per se illegal in those contexts in which it might facilitate horizontal collusion, it should be treated under the rule of reason in other contexts. Although both the House and Senate reports indicate awareness that the Supreme Court had previously declared RPM illegal per se and no doubt expected that they were remitting RPM to that status by repealing the Fair Trade laws, it is also true that there is nothing in the legislative history which indicates a congressional disposition to limit the power of the courts to continue, through

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11/ 433 U.S. at 51, n.18. The Court repeated these views subsequently in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102-03 (1980).

interpretation, the evolution and adaptation of the Sherman Act in light of the continuing development of microeconomic analysis. 12/

In our judgment, the most damaging consequences of continuation of a sweeping per se rule against RPM flow not from the fact that manufacturers cannot enter formal price arrangements with their distributors, although that would be damaging enough, but from the implications of such a sweeping rule for other forms of vertical distribution controls. Any time a manufacturer attempts to control the distribution of his goods so that they receive a more costly type of treatment at the point of sale, he must cope with the free rider problem posed by noncooperating retailers who, by refusing to incur those costs, place themselves in a position to undersell. That is true whether the manufacturer uses restricted sales territories, location clauses, exclusive dealing arrangements, or some other approach. All are nominally judged under the rule of reason notwithstanding that all involve the necessary suppression of a destructive form of price cutting which has only very short run advantages but suppresses investment incentives for new, complex products. The Supreme Court fully recognized, in GTE-Sylvania, that suppression of this type of intrabrand competition was involved and that such suppression was essential to the attainment of important, long-range goals.

Under the current state of the law, however, it is open to any retailer who refuses to market in accordance with the manufacturer's preferences, and without regard to the intensity of existing interbrand competition, to compel a manufacturer to deal with him on his terms through treble damage litigation in which it is asserted, quite accurately in a

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12/ As Robert Bork has observed: "Congress has not legislated per se illegality, either through this repeal [of the Fair Trade Laws] or in the original Sherman Act . . . . The Court, presumably, still has its original obligation to develop the law of the Sherman Act according to its best economic understanding." Vertical Restraints: Schwinn Overruled, 1977 Sup. Ct. Rev. 171, 191-92. The Court must, of course, "give shape to the statute's broad mandate" [National Society of Professional Engineers v. United States, 435 U.S. 679, 688 (1978)], through the exercise of "lawmaking powers" [Texas Industries, Inc. v. Radcliff Materials, Inc., 101 S.Ct. 2061, 2069 (1981)].

sense, that a purpose and an effect of the territorial arrangement selected is to suppress intrabrand price competition. In short, the per se rule against RPM goes far to subvert, in practice, the rule of reason treatment which is, in theory, accorded to all other vertical distribution controls. So long as manufacturers must abide the outcome of trial before juries--juries most often composed largely of persons with no business experience--on the question whether "price fixing" in that sense was a purpose or effect of the selected distribution arrangement, manufacturers will be strongly deterred not just from entering formal price arrangements, but from resorting to a wide variety of distribution controls.

We regard that state of the law as unsatisfactory, and are reviewing the possibility of asking the Supreme Court to change it. We recognize the importance to the general public of the principle of stare decisis and the desirability of promoting certainty in legal rules. However, the Supreme Court itself has emphasized the superior importance of refining legal analysis in the field of vertical restraints. In Sylvania, the Court did not hesitate to reverse its own recent decision in Schwinn based on improved economic analysis. In view of the Court's action in Sylvania, it is not inappropriate to seek reconsideration of a legal doctrine which, we believe, has the unintended effect of injuring American consumers. If, however, the Court is disinclined to modify its traditional approach in this area, or if the Court reads the 1976 legislation as foreclosing its ability to reconsider the issue, we will then consider the appropriateness of seeking legislative change.

Thank you very much for your continuing interest in our antitrust enforcement policies. I hope this information will help further articulate our position on this matter.

Sincerely yours,

William F. Baxter

William F. Baxter
Assistant Attorney General
Antitrust Division